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Identifying the legal parent/child relationship and the biological prerogative: Who then is my parent?

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1. Introduction

The parent/child relationship lies at the heart of family life – and family law. Legal parental status¹ gives rise to parental responsibilities and rights, rights to aliment and child support, rights in succession, and it carries consequences for domicile and immigration. Still more fundamentally, the recognition in law of the parent/child bond is critically significant for both the parent and child:

What, after all, to any child, to any parent, never mind to future generations and indeed to society at large, can be more important, emotionally, psychologically,

¹ Terms such as “parent” “parenting” “parenthood” and “parentage” can be used (sometimes interchangeably) to refer both to the genetic progenitors of the child, and to the persons who have day-to-day responsibility for the child: the genetic parents and the social parents respectively. In many cases, these will be the same two persons. For the avoidance of ambiguity however, the term “legal parental status” will be used here to refer to the people treated in law (rather than in social or psychological terms) as the parents of the child, and who have the legal responsibilities and rights which follow therefrom.

socially and legally, than the answer to the question: Who is my parent? Is this my child?²

Yet how should the parent/child relationship be identified in law? Traditionally Scots law has given priority to the bloodline or genetic bond,³ and this has only (relatively) recently been dislodged in limited circumstances, namely “full legal transplant” adoption⁴ and legally regulated assisted conception.⁵ In these cases, the law recognises a break in the genetic link between parent and child, and ascribes full legal parental status to specified adults, in tightly defined circumstances. In cases of natural insemination, however, biological lineage still reigns supreme. In the case of fathers, Professor Hacker argues that paternity is seen “almost exclusively as a biological fact”.⁶ Yet this makes it impossible for the law to recognise other bases as a foundation for legal parental status: “the gene focus of the current regime means that the law cannot knowingly accept a formal father-child relationship without a genetic link. And that link becomes easier and easier to scrutinise.”⁷ Given the wide range of social relationships which can form the basis of family life, relying exclusively on a genetic link to establish legal parental status may fail to meet the needs of parents and children. The time has come for Scots law to revisit the question of what makes a parent, in the eyes of the law. Biology may be one element, but it need not be the only – or essential – one.

This question requires us to grapple with the fundamental issue of the significance of genetics versus psychological or social parenthood. As Lady Hale identified, “natural” (rather than legal) parenthood may arise in at least three ways: genetic, gestational, and psychological, and has recognised the value of all three: “each of [these] may be a very significant factor in

² *A and others in the matter of the Human Fertilisation and Embryology Act 2008*, [2015] EWHC 2602 (Fam), para 3, per Sir James Munby.

³ That is, Scots law has treated the two biological parents as the legal parents. Before genetics could be ascertained through DNA testing, reliance was placed on blood tests (*Docherty v McGlynn* 1983 SLT 645) or family resemblances (*Grant v Countess of Seafield* 1926 SC 144).

⁴ Full legal transplant adoption was first recognised in the Adoption of Children (Scotland) Act 1930. It is now regulated by the Adoption (Scotland) Act 1978 and the Adoption and Children (Scotland) Act 2007. See also AB Wilkinson and Kenneth McK Norrie, *The Law Relating to Parent and Child in Scotland*, 3rd edn by Kenneth McK Norrie (SULI, 2013), paras 21.01-21.07.

⁵ The Human Fertilisation and Embryology Act 2008 ss33-47 sets out who will be the mother and the father or other parent in cases of donor conception and IVF treatment. In the case of surrogacy, s54 makes provision for identifying the first legal parent(s) and thereafter transferring that legal parental status to the commissioning couple.

⁶ Birke Hacker, “Honour Runs in the Blood”, (2017) LQR 36 at 39.

⁷ Birke Hacker, “Honour Runs in the Blood”, (2017) LQR 36 at 39.

the child's welfare, depending upon the circumstances of the particular case.”⁸ In her words, these three routes to natural parenthood can be described as follows:

The first is genetic parenthood: the provision of the gametes which produce the child. This can be of deep significance on many levels. For the parent, perhaps particularly for a father, the knowledge that this is "his" child can bring a very special sense of love for and commitment to that child which will be of great benefit to the child... For the child, he reaps the benefit not only of that love and commitment, but also of knowing his own origins and lineage, which is an important component in finding an individual sense of self as one grows up...

The second is gestational parenthood: the conceiving and bearing of the child... a relationship which is different from any other.

The third is social and psychological parenthood: the relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting.⁹

Given these alternative routes to “natural” parenthood, and the very real significance of all three to the adult and child, we need to examine whether it is sufficient to have just one route to legal parental status. Is biology rightly placed at the heart of the legal parent/child relationship? What factor(s) should the legal system use to determine who the legal parents are, and how it can adjudge between competing claims? Our failure so far to address these prior questions has led to a lack of clarity and understanding of what might result when questions of (typically) paternity arise, and are sought to be resolved solely through reference to biology and genetics. If we are to apply the scientific certainties of genetics and DNA testing to the parent/child relationship, we need to have a clear legal and social understanding of what those results should tell us. Should they simply provide information as to who the genetic progenitor is? Or should they determine who the legal parent is?

⁸ *In re G (children)* [2006] UKHL 43, paras 33.

⁹ *In re G (children)* [2006] UKHL 43, paras 33-35. In relation to gestational parenthood, Lady Hale emphasised the significance of this, but it is not the direct focus of this article. As Lady Hale said: “the process of carrying a child and giving him birth (which may well be followed by breast-feeding for some months) brings with it, in the vast majority of cases, a very special relationship between mother and child, a relationship which is different from any other.” (para 34).

Before moving on to analyse these issues, three preliminary points can be made. First, and critically, I wish to emphasise that I am not advocating any denial of the biological or genetic “truth”. There is no need to deny someone information about their genetic antecedents or descendants. That two people are directly related as progenitor and offspring is an incontrovertible fact. My concern lies with translating that truth – a factual DNA result which identifies someone’s genetic heritage – into a legal “truth”, ie who *should* be recognised in law as a parent. This is particularly the case now it is possible to know with scientific certainty, through DNA testing, whether a genetic relationship exists. The old legal presumptions and social safeguards can be overturned with ease. Before we automatically equate genetics with legal parental status, we need to be clear as to the policy reasons for doing so, and be honest that this is what we are doing. As the law currently stands, in Scotland at least, there has been no such debate about the status of genetics in the parent/child relationship, and this omission must be remedied. This need not however result in the suppression of biological or genetic knowledge, even if the legal consequences of such knowledge are revised.

The second point is that, although the statutory language is, rightly, gender neutral, questions of *parentage* tend in fact to be questions of *paternity*. As Professor Diduck has observed:

disputed parentage was traditionally, and still is, virtually always about disputed paternity and so the ‘universal principles’ about a child’s need to know his or her identity developed from responses to questions about a child’s paternity. Adopting the gender-neutral language of identity or origins simply masks the importance thus attributed to knowledge of *paternal lineage*.¹⁰

While this raises broader questions of the societal role for paternal lineage, it remains the case that parentage is typically a question of paternity. If nothing else, the practical reality is that it is difficult (although not impossible¹¹) to dispute who carried and gave birth to the

¹⁰ Alison Diduck, “‘If only we can find the appropriate terms to use the issue will be solved’: Law, identity and parenthood”, (2007) 19(4) CFLQ 458, at 468.

¹¹ *Douglas v Duke of Hamilton* (1769) 2 Pat 143, [1769] UKHL 2_Paton_143. See also Lesley-Anne Barnes Macfarlane, “A Noise all over Europe: *Douglas v Duke of Hamilton*”, in John P Grant and Elaine E Sutherland (eds) *Pronounced for Doom* (Avizandum, 2013). In France, it is possible for a woman to give birth anonymously, under the doctrine of “accouchement sous X”, in which case there could be a question mark hanging over the identity of the biological mother: see further R. J. Blauwhoff, ‘Tracing down the historical development of the legal concept of the right to know one’s origins: Has “to know or not to know” ever been the legal question?’, (2008) Vol 4 Utrecht Law Review 99, at 108.

child. Further, genetics is not relevant in the question of identifying the mother, since the law has opted to recognise the gestational mother as the legal mother in all cases. In cases of natural insemination, the gestational mother will, of necessity, be the genetic mother. In those cases of assisted conception where a donor egg is used, the mother recognised by law will be the woman who carried the pregnancy, and not the woman who provided the genetic material.¹² Therefore, using genetics to determine parentage is gendered in that it can only be the father who can have the presumption of parenthood set aside based exclusively on *genetic* evidence. This is of course a concern in its own right, and the question of determining motherhood resulting from assisted conception may also need to be revisited. For the present, however, this article will focus on the role of biology and genetics and will default to the presumption that the person whose genetic connection – and therefore whose legal parental status – is being established or overthrown is the father.

The third preliminary point is to note that the following analysis will focus on cases of natural insemination, rather than assisted reproduction (whether donor or otherwise), surrogacy, and adoption. In these specific cases, legal parental status is governed by detailed statutory regimes. There may be plenty that can be critically said about these regimes, but the present focus is on (i) the position of fathers and children where (ii) the conception has occurred through natural insemination.¹³ In such cases, the *pater est* presumption will apply. Now rendered in statutory form in s5(1)(a) of the Law Reform (Parent and Child) (Scotland) Act 1986 (the “1986 Act”),¹⁴ this is the presumption that *pater est quem nuptiae demonstrant*: the father is he whom the marriage points out, ie the father is the man married to the mother at the time of conception or birth. In the case of a man who is not married to the mother, a second statutory presumption is contained in s5(1)(b) of the 1986 Act, whereby he is presumed to be the father where both the father and mother have acknowledged him as the father, and he has been registered accordingly.¹⁵ The statutory basis for rebutting these

¹² Section 33 of the Human Fertilisation and Embryology Act 2008, which applies in all cases, including surrogacy.

¹³ For this reason, the position of same sex parents is not specifically addressed.

¹⁴ For a detailed account of s5 of the 1986 Act, including the modifications of the common law presumption in statutory form, and rebutting the presumption, see AB Wilkinson and Kenneth McK Norrie, *The Law Relating to Parent and Child in Scotland*, 3rd edn by Kenneth McK Norrie (SULI, 2013), paras 3.09 – 3.20. The discussion herein will focus on the statutory presumption, rather than the prior common law one.

¹⁵ 1986 Act, s5(1)(b), with reference to the Registration of Births, Deaths and Marriages (Scotland) Act 1965. The interaction between these two presumptions is unclear: who is presumed to be the father where two

presumptions, through seeking a declarator of parentage or of non-parentage,¹⁶ merits a fresh analysis. The time is ripe to assess whether the legal criteria serve the interests of parent and children.

2. Overturning the legal parent/child relationship in practice: the role of biology

Determining the legal parent/child relationship is of great practical and theoretical significance. This question affects every child born in Scotland (save for those instances covered by specific statutory provision regarding adoption and assisted conception) – and of course, their parents. Yet for some children, the impact will be more forcibly felt than for others: statistics from the National Records of Scotland show that for the five years from 2012-2016 there were on average 41 declarators of non-parentage received by them in each year.¹⁷ Although these figures are not definitive, as they may include declarators sought under the HFEA 2008 and there may also be separate court statistics, they nevertheless indicate that Scottish courts are being called upon to determine changes to a child's legal parent subsequent to the initial birth registration. And two Scottish decisions from the last few years have underlined, in different ways, the significance of why it is time to revisit this debate.

The first is *CS v KS and JS*,¹⁸ a 2014 Sheriff Court decision which concerned a man who, 14 years after his son was born (and only after divorcing from his wife), started to have suspicions that he may not have been the boy's genetic father. The husband's new wife, and his own family, began to ask questions. The husband therefore raised an action for a declarator of non-parentage in terms of section 7 of the 1986 Act, to establish that – despite the *pater est*

different men fulfil the two presumptions, ie one by being married to the mother and one by being acknowledged and registered as the father? It would be useful to have a clear statement as, for example, in the Family Law Act of British Columbia [SBC 2011], where s26(3) states “If more than one person may be presumed to be the child's biological father, no presumption of paternity may be made.” A further lack of clarity exists regarding the relation between the statutory *pater est* presumption and the statutory ascription of legal parental status under the Human Fertilisation and Embryology Act 2008, whereby the father of the child conceived through the placing of gametes or an embryo in the woman is the man who fills the criteria in ss36 and 36, but s38(3) then goes on to state that these provisions do not apply where any other enactment or rule of law does. The cumulative effect seems to be that, even in cases of donor insemination, the father will be identified first through s5 of the 1986 Act, but where that is challenged, the father will be identified through the 2008 Act. See AB Wilkinson and Kenneth McK Norrie, *The Law Relating to Parent and Child in Scotland*, 3rd edn by Kenneth McK Norrie (SULI, 2013), paras 4.11-4.13.

¹⁶ 1986 Act, s7. See AB Wilkinson and Kenneth McK Norrie, *The Law Relating to Parent and Child in Scotland*, 3rd edn by Kenneth McK Norrie (SULI, 2013), paras 3.21 – 3.37

¹⁷ The precise figures are: 2012 (41); 2013 (46); 2014 (40); 2015 (40); 2016 (40).

¹⁸ *CS v KS and JS* [2014] SCLIVI 57. See also Gillian Black, 'When is a Parent not a Parent?: *CS v KS and JS* and the Question of Genetic Parentage or Social Parenting', (2015) *Edinburgh Law Review*, Vol 19, pp 263-268.

presumption – he was not in fact the father. The statutory test for a declarator of non-parentage is largely undefined. Section 7 of the 1986 Act simply talks about raising an action for a declarator of parentage or non-parentage, and sets down criteria regarding standing and title in terms of domicile of the pursuer and the child. The only definition of parent is provided in section 8, which states that a parent “includes a natural parent”, without further expanding on any element of this.¹⁹ However, it is suggested that a declarator in terms of the 1986 Act could not be sought in relation to an adopted child or one conceived using assisted reproduction. In both those cases, separate statutory regimes apply,²⁰ identifying the legal parent of the child. Accordingly, a declarator of parentage or non-parentage will only be relevant where the child is conceived naturally and the statutory *pater est* presumption, or the equivalent for unmarried parents, applies.²¹ Section 5 also states that the standard of proof for rebutting these presumptions is “a balance of probabilities”.²² It is critical to note that nowhere in the 1986 Act is the court required to consider the best interests of the child: the welfare principle has no role to play here. The other two prongs of the children’s rights triumvirate – the right to be express a view²³ and the no order principle²⁴ – are likewise absent.

Although there is no statutory obligation to consider the best interests of the child, the sheriff did attempt to address issues of welfare and indeed the views of the pursuer’s son by citing him (as second defender) and by appointing a *curator ad litem* to have regard to his welfare. No appearance was entered by the *curator*, or either the first defender (the mother) or the son.²⁵ Their position on this action is therefore unknown.

¹⁹ Since the 1986 Act predates (by some 20 years) Lady Hale’s judicial use of the term “natural parent” as encompassing genetic, gestational and psychological parents, it seems highly unlikely that the drafters of the 1986 Act had these categories in mind. Rather, natural parent here presumably refers to the biological parent of a child conceived naturally.

²⁰ Respectively, the Adoption (Scotland) Act 1978 and the Adoption and Children (Scotland) Act 2007; and the Human Fertilisation and Embryology Act 2008.

²¹ Contained in the 1986 Act, s5(1).

²² 1986 Act, s5(4).

²³ The right of the child to express his or her views freely in all matters concerning him/her is one of the fundamental principles of the UN Convention on the Rights of the Child, contained in art 12, and given specific statutory recognition in a number of Scottish statutes: see for example the Children (Scotland) Act 1995, s11(7)(b). Typically, a child aged 12 and over is presumed in Scots law to be of sufficient age and maturity to form a view: as for example in the Children (Scotland) Act 1995, s11(10).

²⁴ The principle that the court should only make an order concerning a child if it consider it better for the child that the order be made than that none should be made at all – which in effect prioritises the status quo. For a statutory example, see the Children (Scotland) Act 1995, s11(7)(a).

²⁵ *CS v KS and JS* [2014] SC LIVI 57, para 2.

At the outset of CS's application, the sheriff noted that the pursuer had a "genuine and proper" reason for bringing the action: his obligation to pay child maintenance.²⁶ The parent/child relationship was thus reduced to an economic consideration, whereby the significant consequence of the legal relationship was deemed to be an obligation to support financially a genetic child. However, by the time the action was eventually heard, in July and August 2014, the son had passed his 17th birthday.²⁷ At this point, most of the practical parenting issues, encapsulated in the father's parental responsibilities and rights²⁸ had fallen away, together with most obligations of financial support, particularly in terms of the Child Support Act 1991 (as amended). The main legal consequences of a declarator in this case therefore were to end any succession rights and obligations, together with the remaining obligations of aliment.²⁹

On the basis of evidence from the father and various third parties,³⁰ and drawing an inference (as he was entitled to do³¹) from the *lack* of DNA evidence provided by the ex-wife and son, who refused to engage with the litigation,³² the sheriff granted the declarator of non-parentage. Essentially, the evidence pointed towards a lack of genetic relationship, and the refusal to provide DNA evidence led to the inference that there was something to hide. Cumulatively, and on a balance of probabilities, these suggested that the pursuer was not the *genetic* father – although he had been *acting* as the father for over 16 years (and, as far as

²⁶ *CS v KS and JS* [2014] SC LIVI 57, para 5.

²⁷ His exact age or birthday were not given, but the date of conception was given as July or August 1996, which would result in a date of birth around May 1997, making him over 17 by July 2014.

²⁸ In terms of ss1 and 2 of the Children (Scotland) Act 1995.

²⁹ Questions of domicile may also have been affected, by depriving the son of his domicile of origin, though, as a 17 year old, he would presumably have a domicile of choice.

³⁰ The evidence included details that the son had dark skin, dark hair and brown eyes, in contrast to the pursuer and his former wife, who were described in the judgment as having "typical Scottish pale skin" and blue and green eyes. There was also evidence from the pursuer's brother that the former wife had had an affair at the time of conception (July and August 1996), with a local Asian man.

³¹ Where a party refuses to provide a sample or consent to such testing, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, section 70, enables a court to draw such adverse inference as seems to the court to be appropriate.

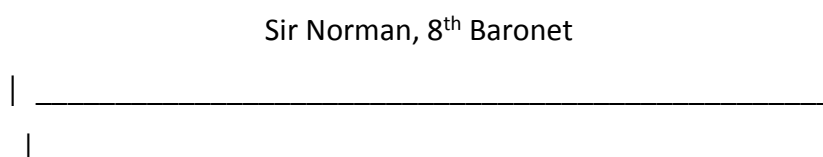
³² And had previously refused to provide samples for DNA testing when requested by the father's solicitors and by the Child Support Agency: para 5.

can be deduced from the case report, living in the family house until the son was nearly 10³³). The sheriff therefore found and declared that the “Pursuer is not the father of the child JS.”³⁴

The legal consequence of the father’s successful petition was to sever the parent/child relationship in the eyes of the law. The case report does not contain any insight into the social and emotional consequence: one is left to speculate as to the son’s reaction to this action, and the termination of the legal father/son relationship – and indeed, how the father felt when his petition was granted. Here, genetics (although not DNA evidence) overturned an established relationship, which had subsisted for at least the first ten years of the boy’s life, and which was also supported by the *pater est* presumption.

Although not relevant in this case, it is also worth noting that there is no element of personal bar in such cases: if the pursuer had known at any earlier stage that his “son” had been conceived as a result of an extra-marital affair, but had still accepted him, legally and socially, as a son, not least through the *pater est* presumption, he could nevertheless have had recourse to a declarator of non-parentage at any later stage.

The second decision is from the UK Privy Council and in a very different context. In *Pringle of Stichill*,³⁵ the father and son in question (Sir Norman and Norman: respectively the 8th and 9th baronets) had long since died, and the dispute was between their successors as to who should succeed to the baronetcy. The action was raised by Murray, the eldest son of Sir Norman’s *second* son Ronald. His challenge was to the right to be enrolled as the 11th baronet, against Simon, the grandson of Sir Norman’s *eldest* son, Norman. The relevant elements of the family tree can be represented as follows:³⁶



³³ The sheriff noted that the parties separated in about January 2007, although whether this was when the cohabitation ended is not clear. Para 7.

³⁴ *CS v KS and JS* [2014] SC LIVI 57, opening para (unnumbered).

³⁵ [2016] UKPC 16.

³⁶ This abbreviated family tree focuses only on the relevant parties to this dispute: other siblings, and spouses, have been omitted.

Norman, 9th Bt (born 1903)

|

Sir Steuart, 10th Bt

|

Simon

Ronald (born 1905)

|

Murray

In support of his case, Murray relied upon DNA evidence available which pointed to the fact that Sir Norman's eldest son (Norman, born 1903) could not possibly be related to him genetically. Despite this genetic evidence, the social evidence was that Norman, having been born in the marriage, had been accepted and raised as a child of the family, regardless of any doubts which Sir Norman may have had (and the evidence noted by the court was that there had been no such doubts³⁷). Norman's position as the "cuckoo in the nest" had remained (largely³⁸) hidden from his birth in 1903: he was enrolled without opposition³⁹ as the 9th baronet on his father's death in 1919, and in due course the title transferred on his death to his own son (the 10th baronet) in 1961.

When DNA evidence in 2010 demonstrated that there was no genetic connection between the two Normans, the 8th and 9th baronets, the order of the Privy Council was to transfer the baronetcy away from the 9th baronet's descendant, Simon, in favour of Murray, as the genetic descendant of the 8th baronet. Although no ongoing parent/child relationship was destroyed in this case, nonetheless, the DNA evidence overturned nearly 100 years of succession, and led the Privy Council to suggest that the consequences of applying DNA evidence may merit closer consideration:

In the past, the absence of scientific evidence meant that the presumption of legitimacy could rarely be rebutted and claims based on assertions that irregular procreations had occurred in the distant past were particularly difficult to establish. Not so now. It is not for the Board to express any view on what social policy should be. It notes the ability of DNA evidence to reopen a family succession many

³⁷ In private writings from 1918-1919, the 8th Baronet narrated the breakdown of his marriage, but did not suggest he had any doubts as to the paternity of his eldest son, Norman: *Pringle of Stichill*, para 10.

³⁸ Sir Norman's second son (and ultimately his legitimate heir) was Ronald. There was evidence from the sister of Ronald's daughter-in-law, that Ronald had told her and her sister (who was married to Ronald's younger son, ie the younger brother of Murray, the petitioner in this action) that Norman was in fact illegitimate and that he, Ronald, was thus the legitimate heir: *Pringle of Stichill*, para 9.

³⁹ *Pringle of Stichill*, para 8.

generations into the past. Whether this is a good thing and whether legal measures are needed to protect property transactions in the past, the rights of the perceived beneficiary of a trust of property, and the long established expectations of a family, are questions for others to consider.⁴⁰

Together, *CS v KS* and *Pringle of Stichill* demonstrate how an exclusive focus on genetics can set aside established parent/child relationships – and in doing so, suggest that the law’s focus on the genetic “truth” comes at the cost of the social “truth”. In both cases, the *pater est* presumption was rebutted, without consideration of the social costs, or past property transactions, or the long established expectations of a family. The current legislative regime for granting a declarator of non-parentage does not require any consideration of these costs or the wider circumstances of the case. Instead, the parent/child relationship, parental responsibilities and rights, property transactions, and succession are all bound up in genetics. This may have the advantage of simplicity and certainty, but the downside should not be underestimated: “such an approach, cheap as it may be in terms of scientific proof, comes at a high social cost. It can endanger or destroy otherwise stable family bonds”.⁴¹ Is biology the best answer we can give to the question “Who then is my parent?”

3. Changing Social and Legal Landscapes

While there has been in Scotland no political or legal analysis of what *should* lie at the heart of the legal parent/child relationship, there has been law reform which has impacted on this question. Scots law still operates on the presumption that the man married to the mother at the time of conception or birth is the father, with an equivalent statutory presumption for a man who is not married to the mother.⁴² Both these presumptions, for married and unmarried parents, strike a balance between protecting the man who socially occupies the role of father and has the support of the mother (either through her being married to him, or through her acknowledgement of him as the father), with an implication that the man filling this role will be the genetic father. Although biology appears to be the underlying basis here, it is not the explicit criterion for being the father under these presumptions: rather the social role is. Yet having given weight to the social role, as the basis of the statutory presumptions,

⁴⁰ Ibid, para 80.

⁴¹ Birke Hacker, “Honour Runs in the Blood”, (2017) LQR 36 at 39.

⁴² 1986 Act, s5(1)(a) and (b).

nothing further is done in law to protect this social position, or balance it against a competing biological/genetic challenge, when it comes to rebutting the presumptions. Such protection previously existed – not least through a lack of scientific certainty, which made it difficult to prove conclusively the lack of genetic connection. But the certainties of DNA testing, coupled with legal reform, have fundamentally shifted the balance struck by these statutory presumptions, so that the social position of the father has been entirely supplanted by the genetic one. Two reforms in the last 30 years add up to more than the sum of their parts, with significant consequences for parents and children. These are (i) the removal of the status of illegitimacy and (ii) the corresponding revision downwards of the high standard for proving illegitimacy.

The 1986 Act stripped the doctrine of illegitimacy of much of its content: section 1 (originally entitled “Legal equality of children”) stated: “The fact that a person’s parents are not or have not been married to one another shall be left out of account in establishing the legal relationship between the person and any other person”. Twenty years later, the Family Law (Scotland) Act 2006 revised the 1986 Act to abolish the status of illegitimacy altogether, so that section 1 of the Act is now entitled “Abolition of status of illegitimacy” and starts with the categorical statement: “No person whose status is governed by Scots law shall be illegitimate”.⁴³ These legal changes reflect a relaxing of the social attitudes to being born outside marriage, and the fact that it is now more common than not to be born outside marriage.⁴⁴

When the social and legal consequences of illegitimacy were severe, children were protected from these damaging consequences by the high standard to be met before the law would recognise that the *pater est* presumption had been overturned. For example, as held in *Russell v Russell*,⁴⁵ it was not possible for a husband or wife to give evidence of non-intercourse in order to render illegitimate a child born during the marriage. Yet once the legal (and social) consequences of illegitimacy were no longer widely significant, the test for

⁴³ The one remaining area where illegitimacy is still relevant is in the succession to titles, honours, dignities and coats of arms, as per s9 of the 1986 Act.

⁴⁴ In 2015 51.2% of children in Scotland were born to unmarried parents: “Scotland’s Population: The Registrar General’s Annual Review of Demographic Trends”, National Registers of Scotland, 2015.

⁴⁵ [1924] AC 687.

overturning the *pater est* presumption was correspondingly relaxed. Most significantly, the test for rebutting the presumption was revised downwards from beyond reasonable doubt (a near-impossible standard in the days before DNA testing) to a balance of probabilities: a test which can easily be met by the scientific accuracy of a DNA test.

A declarator of non-parentage would render the child illegitimate. Even if the legal consequences of “illegitimacy” no longer exist, there are still significant legal consequences arising from a declarator of non-parentage, as regards parental responsibilities and rights, succession, aliment, and domicile, not to mention the day-to-day social parent/child relationship. And while children might not suffer any social stigma from being found to be illegitimate, the social consequences for the individual parent/child relationship could of course be extensive.

These reforms therefore illustrate the danger of focusing on one aspect of law reform without considering the bigger picture. Recognising that illegitimacy is no longer legally or socially significant led to the downwards revision in the standard of proof to establish it: but this was done without consideration for the parents and children who are thus more easily deprived of the parent/child relationship. Although the stigma and legal status of illegitimacy may no longer be a concern, it would be a mistake to think that unpicking a parent and child relationship based solely on genetics is an insignificant step. Yet there has been no sustained assessment of the impact of these legal shifts, or how they operate in a changed and changing society.

As this section has shown, the cumulative impact of legal and scientific developments work against the interests of parents and children. The removal of the stigma of illegitimacy, coupled with the reduced standard of proof to challenge parentage, and the definitive answers now available through DNA testing, mean that genetics has been elevated to a conclusive and straightforward answer to the question “who then is my father?”

Yet alongside this has been an expansion in the range of other parent/child relationships which benefit from legal recognition where there is no biological link between parent and child. As noted above, adoption, surrogacy and donor conception all provide examples of a

break in the legal chain from biology to parental status. While these s are not the focus of this article, they do demonstrate that a biological connection is not a necessary prerequisite for legal recognition of family, let alone the social function of it. Legal parental status must be recognised for what it is: a legal concept. There is no obvious need for this legal concept to map onto the biological reality of who the genetic progenitors are. Indeed, developments in this vein can be seen in those jurisdictions which are now recognising three or more legal parents.⁴⁶ Since a child cannot have three progenitors, at least one of the parents in these jurisdictions must achieve their legal parental status through some other (social) factor.⁴⁷

While DNA evidence may be invaluable – not least given its conclusive nature – the greater weight given to biology in instances of natural insemination sits uncomfortably with the broader understanding of the parent/child relationship in other spheres. Greater recognition of this is essential, not least to tackle three specific objections to relying exclusively upon biology and genetics to determine the parent/child relationship.

4 The Limits of Biology in Legal Parental Status

4.1 Dismantling the parent/child relationship

The first and arguably gravest concern is that biology, and particularly DNA evidence of the genetic link, is typically adduced to dismantle a parent/child relationship which actually exists on the ground – to prove that the existing or presumed parental nexus should no longer be recognised in law, through a declarator of non-parentage. This can be done by the existing father seeking to prove he is *not* the genetic father, as in the case of *CS v KS and JS*.

⁴⁶ The Ontario Supreme Court has recognised that a child may have more than two parents, in a 2007 decision: *A.A. v. B.B.*, 2007 ONCA 2. Section 30 of British Columbia’s Family Law Act [SBC 2011] also allows three parties to reach agreement, before the conception of a child, that all three will be parents.. In the Netherlands, a government report has recommended the legal recognition of multi-parent families in certain circumstances: “Child and Parents in the 21st Century” (2016), at para 11.2.5.

⁴⁷ There is a new medical development which allows three parties to be genetically related to one child, but this is still rare and – importantly – it is not the basis on which the legal recognition of three parents has been made. In cases of mitochondrial IVF, there is a very small (less than 1%) genetic contribution from a second woman to the egg of the first woman, thus meaning two women are involved in the egg that creates the child. Coupled with the male who provides the sperm, this means that 3 adults are involved in the genetic creation of the child, but there is no legal provision for the third adult here (the woman who donates the mitochondrial DNA) to be recognised as a legal parent – and conversely, the legal recognition of three parents is not related to this new treatment.

Alternatively, it can be instigated by a third party, perhaps seeking to prove that he *is* the genetic father, thereby supplanting the person who is currently filling that role. In this case, someone who is currently the legal father will be stripped of that status and, if he is also the social parent, providing day to day care, he risks being undermined or – worse – ejected from this social role by virtue of the change in legal status. In these cases, there is no limit as to who can raise an action for a declarator of non-parentage: it could be the man currently named as the legal father; it could be the man who claims the biological – and legal – connection instead; or it could be any other party seeking to remove the existing “father” from the child’s life. The fact that there is no limit on who can raise the action places biological truth at the heart of the legal parental status: if there were restrictions on who could seek a declarator of non-parentage, it would imply that there was more to the issue than simply identifying the genetic progenitor. Instead, if the question is exclusively one of biological truth, then there should be – and indeed is – no limit as to who can seek to uncover that truth.

Whether the pursuer is the current father or a third party challenger, the role of the biological evidence (and the legal challenge it is supporting) will be a negative one: to dismantle a relationship which exists in reality. The damage is compounded because a declarator of non-parentage does not require a corresponding declarator of parentage to establish an alternative parent in place of the one removed. Thus, the legal effect is to dismantle the legal – and frequently the practical – relationship, without any need to consider what will take its place. And whether the child or other involved parties, such as the mother, fervently support or fervently oppose the petition is irrelevant: there is no scope for the exercise of any discretion to reflect their needs or views. Where an existing parent/child relationship is struck down as a result of DNA or other evidence demonstrating that the “father” is not the genetic father, there is risk of considerable emotional damage to the child, and potentially the father. This situation has parallels with litigation from adoption and care cases, where disputes arise as to whether children should be removed from foster families or placed in adoption, against the wishes of genetic parents. The risk of undermining an established social parent/child relationship has long been recognised here: in the words of Cumming-Bruce LJ in 1985, “... you cannot dig up children in the way that you dig up geraniums: they form emotional roots

and those roots have to be preserved intact.”⁴⁸ His emphasis here is on the *emotional* roots: not the genetic ones. His comments were approved by Lord Oliver of Aylmerton in 1988⁴⁹ and more recently by the Outer House of the Court of Session in 2016.⁵⁰ Roots also featured in *Midlothian Council re Child S*⁵¹ in 2012, where Lord Malcolm was very clear that the status quo which required to be protected was the established and stable social relationship, not the genetic one.⁵² In public law cases regarding care, therefore, it seems that genetics alone is not enough to displace a settled and happy placement for the child,⁵³ yet it remains the primary driver for establishing legal parental status in private law actions. If the state is prepared to recognise the importance of stable social parenting (and accord it legal status, through adoption) in care cases, then there must be good reason to apply a different standard driven by genetics rather than social attachment, in private law disputes.

4.2 Establishing the parent/child relationship

Whereas the concerns above focused on the use of biological and DNA evidence to dismantle a parent/ child relationship, conversely, where a party seeks to *establish* a relationship by virtue of such evidence, different concerns arise. Again, however, the needs and views of the parties involved are not provided for by statute, and their support or opposition has no role to play in the decision to grant a declarator of parentage in terms of the 1986 Act. Yet it seems probable that any attempt to assert a parent/child relationship by virtue of such evidence will typically be in the face of opposition from at least one of the other parties, ie the other parent and/or the child. In cases where there is no such opposition, and all parties consent, then DNA evidence could be used to prove that a father is entitled to be recognised in law as the parent, and reflected in an uncontested petition for a declarator of parentage. If all parties consent that the man is to be recognised as the father, this is uncontroversial: recognising the social reality – the psychological parent in Lady Hale’s words⁵⁴ – has more to commend it as

⁴⁸ *In re L. (Child in Care: Access)* [1985] F.L.R. 95, 100.

⁴⁹ *In re KD (A Minor) (Ward: Termination of Access)* [1988] 1 AC 806 at 829-830.

⁵⁰ *West Lothian Council, Petrs* [2016] CSOH 50.

⁵¹ [2012] CSOH 63 (upheld on appeal: [2013] CSIH 71).

⁵² [2012] CSOH 63, at paras 186-187.

⁵³ See also Alison Diduck, “‘If only we can find the appropriate terms to use the issue will be solved’: Law, identity and parenthood”, (2007) 19(4) CFLQ 458, at 468.

⁵⁴ *In re G (children)* [2005] UKHL 43, para 33, per Lady Hale.

the basis for a day-to-day parent/child relationship than a contested action for declarator founded on the bare fact of a DNA test.

This is especially the case in light of Article 8 jurisprudence from the ECtHR in *Anayo v Germany*,⁵⁵ where the Court held that:

a biological kinship between a natural parent and a child alone, without any further legal or factual elements indicating the existence of a close personal relationship, is insufficient to attract the protection of Article 8... As a rule, cohabitation is a requirement for a relationship amounting to family life. Exceptionally, other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto ‘family ties’”⁵⁶

Pointing to biological kinship alone should not, in the eyes of the ECtHR, typically be sufficient to establish “family life” in terms of Article 8. Yet this remains the approach under the 1986 Act, where the declarator is predicated on evidence of the biological or genetic tie, without more. The fact that Scots law does indeed allow a declarator of parentage to be sought on this basis, without any indication of a “close personal relationship” arguably fails to take account of the ECHR jurisprudence. Moreover, it also fails to consider the welfare principle, and ask what is in the best interests of the child – or what the views of the child are.

4.3 The Best Interests of the Child and the Children’s Rights Triumvirate

Perhaps the strongest argument of all against the indiscriminating reliance on genetic evidence is the need to consider the rights of the child. The three rights at the heart of judicial (and state) protection of children are (i) the best interests of the child; (ii) the right of the child to express his/her views; and (iii) the “no order” principle. In compliance with Article 3 of the UN Convention on the Rights of the Child (“UNCRC”), any decision by a court concerning a child should regard the best interests of the child as a primary consideration – and, where incorporated in Scots law by statute, this has been elevated to the paramount consideration.⁵⁷ Article 12 UNCRC obliges States Parties to assure to the child the right to express his/her views freely in all matters affecting the child.⁵⁸ But despite these fundamental UNCRC principles, there is no overarching duty on the Scottish courts to consider the welfare

⁵⁵ *Anayo v Germany* [2010] ECHR 2083.

⁵⁶ *Anayo v Germany* [2010] ECHR 2083, para 56.

⁵⁷ See for example, the Children (Scotland) Act 1995, s11(7)(a).

⁵⁸ For statutory examples in Scots law, see the Children (Scotland) Act 1995, s6 and s11(7)(b).

of the child in every situation, or to ascertain his/her views, so these are only relevant rights where there is a specific statutory direction to respect them.⁵⁹

Where a declarator (of parentage or non-parentage) is sought in respect of a child under the age of 16, it seems plain that a legal decision of such magnitude should be subject to a statutory duty to consider the rights of the child, and most critically, the welfare principle. But in all cases of natural insemination, the legal father will be determined solely by biology: there is no power or discretion for a Scottish court to consider the best interests of the child in deciding whether to admit evidence which would establish or dismantle a parent/child relationship. It is not open to a judge to exercise any discretion or consider the best interests or views of the child, since the statutory test for a declarator is non-discretionary. Where the court finds that the parent is, or is not, the biological progenitor, that will be determinative of the question of legal parental status. A court is therefore unable to consider the impact of any declarator on an existing parent/child relationship, or the risks of removing or imposing such a relationship – in legal terms at least – upon a child. Likewise, there is no requirement for the court to ascertain the views of the child, and how the declarator might affect them. Consequent upon this, there is also no obligation on the court to establish that it is better for the order to be made than not: there is no presumption in favour of the status quo under the 1986 Act. The statutory test is therefore based solely on assessing the evidence of a biological connection – usually, these days, based on DNA evidence, but as *CS v KS and JS* shows, also by placing weight on a range of factors, including the physical resemblance (or lack of) between adult and child.

This triumvirate of rights does, of course, only apply to children under the age of 16. Where a declarator is sought in respect of a parent/child relationship where the child (i) is over 16; or (ii) has died, then there could never be any scope for considering the best interests of the child, or the views of the child, or the no order principle, since there will be no child under the age of 16 to whom they could apply.

⁵⁹ Elaine E Sutherland, “Scotland: The Marriage of Principle and Pragmatism”, in Elaine E Sutherland (ed) *The Future of Child and Family Law* (CUP, 2012), para 12.13. For a debate about the merits of incorporation see: Elaine E Sutherland, “Supplementary Written Evidence to the Education and Culture Committee of the Scottish Parliament”, 28 October 2013; and Kenneth Norrie, Oral Evidence to the Education and Culture Committee of the Scottish Parliament, 3 September 2013, col 2682.

5. The Case for Reform: Challenging the biological prerogative

As is clear, Scots law focuses exclusively on biology when determining parentage, at the expense of social parenting and the rights of the child, including welfare. Yet it is not axiomatic that the law should operate this way. Examples from France, the USA, and Germany all offer different approaches, which typically place the social family and welfare at the heart of the matter. French law offers protection for social relationships, for example, by tightly controlling access to DNA evidence. There is a complete prohibition on DNA testing without the prior consent of the court, and it is illegal to buy or use a DNA test without such consent.⁶⁰ There are grave concerns with an approach which denies individuals access to such fundamental information and, as was made clear at the outset, concealing such information is not a position supported in this article. Nevertheless, the French approach highlights the legal preference given there to social families over genetics, and the need for judicial authorisation before allowing genetic evidence to be brought to bear on the question of legal parental status. Similarly, the USA's Uniform Parentage Act gives the court authority to deny a motion for genetic testing to determine paternity where this is not in the best interest of the child, taking account of factors such as the length of time during which the presumed father has acted as father, the nature of their relationship, and the age of the child.⁶¹

German law also limits reliance on DNA evidence, by recognising that the best interests of the (minor) child might outweigh the claims of the person seeking clarification:

The court suspends the proceeds [to clarify genetic parentage] if and so long as the clarification of the natural parentage would result in a considerable adverse effect on the best interests of the minor child which would be unreasonable for the child even taking into account the concerns of the person entitled to clarify.⁶²

There is also a restriction in Germany as to who can challenge parental status: sec 1600 BGB limits the classes of people who can challenge a presumption of paternity.⁶³ The five categories of person who can challenge are:

1. the father (as defined by sec 1592 BGB, which includes the *pater est* presumption);

⁶⁰ French Penal Code, art 226-28.

⁶¹ Uniform Parentage Act 2006, section 608(b).

⁶² BGB, Section 1598(a)(3).

⁶³ BGB, Section 1600, subsection 1

2. a man who declares he had sexual intercourse with the mother during the period of conception;
3. the mother;
4. the child; and
5. the competent authority.⁶⁴

Where a man seeks to show that he is the father by virtue of having had sexual intercourse with the mother at the period of conception (rather than being married to her), he can only do so where there is “no social and family relationship between the child and its father..., and that the person contesting is the natural father of the child.”⁶⁵ Thus, a third party could not step in and challenge another man’s paternity where the other man has an existing social and family relationship with the child (defined to mean “actual responsibility” for the child⁶⁶). Such an approach preferences an established family relationship over any challenge based solely on DNA evidence.

Essentially, in these systems, the state is giving priority to the legal status, typically founded on social relationships, through the *pater est* presumption, rather than deferring to the genetic fact. Crucially, that legal status takes account of a wider range of factors than only biology. Before the advent of DNA testing, it is arguable that a similar approach was taken in the UK. As Professor Diduck has argued, a focus on social and psychological relationships used to be regarded as essential to safeguard the family unit which existed on the ground. In contrast, a legal focus on biology in paternity disputes was regarded as potentially detrimental to the welfare of the child, because of the disruption to the established social relationships which the child enjoyed. Yet, as she concludes, the ability to know genetic origins, through DNA testing, has resulted in a significant shift:

Now that we *can* know the biological – or at least the genetic – ‘truth’, it seems that in the interests of our well-being, we *must* know. And not only must we know, it has now become our right to know. We seem happy to be in thrall to biology or nature again in a way that has been unknown for years.⁶⁷

⁶⁴ Defined with reference to BGB sec 1592.

⁶⁵ BGB, Section 1600, subsection 2.

⁶⁶ BGB, Section 1600, subsection 4.

⁶⁷ Alison Diduck, “‘If only we can find the appropriate terms to use the issue will be solved’: Law, identity and parenthood”, (2007) 19(4) CFLQ 458, at 468, emphasis added, references omitted.

It can of course be argued that knowledge of the genetic truth is always in the best interests of the child, and it is certainly not the purpose of this article to argue in favour of suppression of that genetic knowledge. In promoting the need to know this truth, Professor Norrie has argued that “resolving of doubt about his or her parentage, which DNA profiling now conclusively allows, will nearly always weigh more heavily than the protection of rights that may be falsely based.”⁶⁸ Yet while this holds good when legal parental rights (and status) are derived from the biological connection, it also perpetuates the belief that legal rights which are not based on genetics are “false”, and therefore do not and should not merit protection. It is this approach which is at the heart of my argument. There can be no objection to establishing the truth of the genetic progenitor, but there can be serious concerns, as demonstrated above, about translating that automatically to a conclusion as to who *should* be, in law, the parent – and in doing so, concluding that any other claim to parental status is “false”. As Dr Smith has highlighted, this emphasis on biology as a basis for parenting confuses the role of progenitor and social parent: “At the heart of this... lies a biological determinism which elides completely the genetic preconditions of procreation with a value statement about the most desirable social parenting practices.”⁶⁹ At the very least, relying exclusively on “biological determinism” with no reference to the wider social issues is certainly not in the best interests of the child. Law reform is needed, to redress this simplistic and unjust approach.

6. Recommendations

It should be possible for the legal system (and indeed society) to distinguish between the biological truth and the legal import of that information. The state is already well used to doing so in cases of adoption, donor conception and surrogacy. Where a child is conceived through donor sperm or eggs for example, and where the intending parents have followed the approved statutory route, then the law recognises that the donor is not the legal parent, despite the critical biological role they have played in creating the child. It is clear that the state does not have to equate genetic progenitors with parents: moreover, to treat biology

⁶⁸ Norrie and Wilkinson, *The Law of Parent and Child in Scotland*, 3rd edition (W Green, 2013), para 3.33. See also, for example, Andrew Bainham “Arguments about Parentage”, 2008 CLJ 322, at 325-328.

⁶⁹ Leanne Smith, “Clashing Symbols? Reconciling support for fathers and fatherless families after the Human Fertilisation and Embryology Act 2008”, 2010 22(1) CFLQ 46 at 64.

as the infallible marker of legal parental status fails to take cognisance of the rights of the child, especially the welfare principle.

I would therefore contend that Scots law needs to revisit the test for a declarator of non-parentage. The *pater est* presumption recognises that a man married to the mother, or the man acknowledged by the mother, is presumed to be the father, thereby placing social relationships at the heart of the parenting relationship. Any steps to challenge that presumption should likewise reflect this social dynamic. Law reform is needed to ensure that biology alone cannot create or destroy the legal parent/child relationship.

It is proposed that three principles should be introduced in Scots law, to apply when any declarator of parentage or non-parentage is sought in terms of the 1986 Act in cases of natural insemination.

The first proposal is to embed the rights of the child, and specifically the welfare principle, into this test, so that any steps to create or remove a parent/child relationship in law look to what is in the best interests of the child in question.⁷⁰ The need for the court to ascertain the views of the child should also be explicitly included. Not only is this in line with the UNCRC, it also recognises that the parent/child relationship is a legal *and* a social construct, and must therefore take account of the wider social context. Thus, a judge must be satisfied that a declarator of parentage or non-parentage is in the best interests of the child before the application is granted, and part of that welfare assessment would include ascertaining the views of the child, and consideration of the no order principle. Norrie rejects such an approach, stating that disclosure of the truth of paternity *is* consistent with the child's welfare:

The consequences of the establishment of paternity may well be governed by the welfare principle but whether and how paternity is established ought not to be. In any

⁷⁰ There is no obligation to consider the best interests of the child in any of the provisions of the HFEA 1990 or 2008 regarding the legal parents, although this is not surprising since there is no child in existence at the time the adults receive treatment under the Act. There is, however, a duty on clinics in terms of their licence: section 13(5) of the 1990 Act states that the clinic should not provide treatment to a woman “unless account has been taken of the welfare of any child who may be born as the result of the treatment (including the need of the child for supportive parenting...”.

case, the welfare of the child should be accepted as being best served by the establishment of the truth.⁷¹

Again, however, this equates genetic fact with (legal) paternity. Instead, a distinction can be made between establishing genetic truth and the separate question of the legal “truth” of who is the parent, in law – and this second question offers scope for the application of the welfare test. The existence of such a test would mean that, whatever decision the court reached, we could be confident that it was taken with the benefit of the full picture of the parent/child relationship, and not just one element of that: genetics.

A statutory test to have regard to best interests and children’s rights would, of course, fall away when the child in question reached 16 years,⁷² or had died.⁷³ Accordingly, there should also be a statutory discretion to consider the relevant circumstances of the case, which would apply beyond the age of 16, or in circumstances where the child in question had pre-deceased the lodging of the petition. This would enable the court to hear any relevant evidence, including (as may be) defences or responses lodged by the adult child, the mother or (in some circumstances) the existing legal father.

The second principle I would recommend Scots law adopting is to set a clear statutory limit to the class of persons who can seek a declarator of parentage/ non-parentage. The 1986 Act currently sets no limits as to who can seek a declarator, in terms of s7. It is therefore possible that any person with title could, for honest or malicious reason, seek a declarator, in the face of opposition from other involved parties: the current (social and legal) father, the child, or the mother.⁷⁴ Instead, it is recommended that, Scots law should restrict the people who can apply for a declarator of parentage or non-parentage, as in Germany, to a defined group: the legal father; the mother; the child; potentially the state; and a man who claims to be the genetic father, but only where he has leave of the court to apply. In determining whether to

⁷¹ AB Wilkinson and Kenneth McK Norrie, *The Law Relating to Parent and Child in Scotland*, 3rd edn by Kenneth McK Norrie (SULI, 2013), para 3.30.

⁷² Or 18, or other stated age of capacity, as specified in legislation in future years.

⁷³ 1986 Act, s7(2)(c) allows a post mortem challenge.

⁷⁴ Norrie suggests that “while the parents and child are all alive, it will be rarely, if ever, that others have a title to seek a declarator of parentage” (and notes a statutory exception in the Child Support Act 1991, s28): AB Wilkinson and Kenneth McK Norrie, *The Law Relating to Parent and Child in Scotland*, 3rd edn by Kenneth McK Norrie (SULI, 2013), para 3.24. Nonetheless, the lack of statutory guidance as to who has title to sue leaves a worrying gap in the current regime.

grant leave, the court could have regard to factors such as whether there is already a person fulfilling the role of father (as in German law), and the best interests of the child. Conversely, where a man is the father by virtue of the *pater est* presumption, and he has also been fulfilling the role of father (ie acting as father in a social and psychological context), then it is proposed that his right to petition for a declarator of non-parentage should continue, but with the proposed statutory obligation on the judge to consider (i) the best interests of the child as the paramount consideration; and (ii) all relevant circumstances. Cumulatively, these proposals would operate to protect the child and family as an existing social entity, while leaving the door open for judicial consideration of any unusual and unexpected cases which may arise.

The third principle which would also help to protect the social reality as well as the legal status is to introduce a time limit for any such claim. Specifically, any claim should be made during the lifetime of both parties (that is, the pursuer and the child in question): attempting to change the (former) legal status of deceased parties when they are not able to defend the claim would require good cause. This is borne out by the case of *Pringle of Stichill*. A post mortem limit on challenges to paternity would also reflect the concerns voiced by the European Court of Human Rights, which has recognised that post mortem questions of paternity are “emotionally and culturally charged”,⁷⁵ especially where any testing will require a body to be exhumed. Considerations of ascertaining the genetic truth must be balanced against the right to respect for the dead, and for the surviving relatives – and, for obvious reasons, a challenge here does not even offer the advantage of establishing a social parent/child relationship. Allied to this, the rationale for a post mortem challenge is more likely to be financial gain, than social benefit. The introduction of an inter vivos limit would require statutory reform, as s7(2)(c) of the 1986 Act specifically provides for an action to be brought where the alleged parent or child died before the date of the action.

While these proposals would impact on legal parental status, by restricting when a declarator of parentage or non-parentage can be sought, there would be nothing to stop Scots law

⁷⁵ *Jaggi v Switzerland*, Appl No. 58757/00, 13 July 2006; R. J. Blauwhoff, ‘Tracing down the historical development of the legal concept of the right to know one’s origins: Has “to know or not to know” ever been the legal question?’, (2008) Vol 4 Utrecht Law Review 99, at 110.

introducing a separate declarator, being a declarator of genetic status or origin.⁷⁶ This would ensure the genetic truth is known to all parties (especially the child), and would therefore respect that connection, while not converting it into a legal status. Whether such a genetic declarator would always be appropriate (for example, in cases of rape or incest, or indeed against the child's or mother's will) is a debate for another day: the right to know can clash with the right *not* to know.⁷⁷ It remains the case, however, that the legal system could respect the genetic reality without conflating it with the legal (and typically social) reality. Such a declarator may have a particular role to play in cases where either party is now deceased: it would ensure the historical record is accurate, without revisiting legal and social relationships which have, necessarily, come to an end.

7. Conclusion

Social change can drive law reform, and law reform can push forward social change. In this area, changing social norms removed the stigma of illegitimacy, and legal reform rightly recognised this, by removing the legal consequences of being born out of wedlock. Yet this has also shown that law reform can have unexpected and possibly unintended consequences. The resulting emphasis on genetics, with no checks and balances to recognise the social parenting role, has created a situation where Scots law will dismantle, or create, a legal parental relationship based on scientific fact. The interests of all parties – child, father and mother – may not be best served by an approach which focuses on biology at the expense of social parenting. And the best interests of the child will certainly not be served by a legal system which promotes a genetic connection as the touchstone for the parent/child relationship, without stopping to consider how that will affect the day to day life of the child and his or her existing social parental (and indeed sibling) relationships.

⁷⁶ Proposals have been advanced in Germany whereby either party could seek genetic information on an “exclusively informational” basis, with no legal consequences for the established parent relationship: Richard J Blauwhoff, “Tracing down the historical development of the legal concept of the right to know one’s origins: Has ‘to know or not to know’ ever been the legal question?”, (2008) Vol 4 Utrecht Law Review 99 at 113. In a similar vein, there have been academic proposals in the UK for birth certificates to contain information about both the genetic “parents” *and* the legal parents in cases of assisted reproduction: Andrew Bainham, “Arguments about Parentage” 2008 CLJ 322 at 336. See also Elaine E Sutherland, “Scotland: The Marriage of Principle and Pragmatism”, in Elaine E Sutherland (ed) *The Future of Child and Family Law* (CUP, 2012), para 12.20 et seq.

⁷⁷ See further Jonathan Herring and Charles Foster, “Please Don’t Tell Me”, 21(1) Cambridge Quarterly of Healthcare Ethics (2012) 20; R. J. Blauwhoff, “Tracing down the historical development of the legal concept of the right to know one’s origins: Has “to know or not to know” ever been the legal question?”, (2008) Vol 4 Utrecht Law Review 99.

The question of how to deal with biological ties and genetic evidence requires consideration of what is at the very heart of our understanding of the parent/child relationship. But now that it is possible to know the genetic connection with certainty – as a matter of fact – we need to consider how our legal system and our society will respond to that fact. This article has shown that introducing additional measures would protect the social and psychological relationships in existence and enable judges to take a more sensitive and nuanced approach to determining who should have legal parental status. As with jurisdictions such as the USA and Germany, we should ensure that established relationships are recognised, through limiting those with standing to seek a declarator of parentage or non-parentage and, ideally, imposing time limits on any challenge. Moreover, by ensuring any declarator cannot be granted without considering the rights of the child or the wider relevant circumstances, we would recognise that biology alone should not determine the matter. Such reforms would help ensure we can give the best possible answer to the question “Who then is my parent?”